United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7559

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL A. GRIPPE,

Plaintiff-Appellant.

v.

LOUIS J. FRANK, the former Commissioner of Police of the County of Nassau, New York, DANIEL P. GUIDO, the successor and present Commissioner of the Police Department of the County of Nassau, and the COUNTY OF NASSAU, New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEES

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LOUIS J. FRANK, the former Commissioner of Police of the County of Nassau, New York, DANIEL P. GUIDO, the successor and present Commissioner of the Police Department of the County of Nassau, and the COUNTY OF NASSAU, New York,

Defendants-Appellees.

BRIEF ON BEHALF OF APPELLEES

Questions Presented

1. Are appellees entitled to dismissal of appellant's complaint because the claim fails to state a claim upon which relief can be granted?

The Court below answered in the affirmative.

2. Where appellant has fully litigated all the federal constitutional claims in the state courts, may he relitigate these claims by using section 1983 in a subsequent federal suit?

The Court below answered in the negative.

3. Does res judicata apply to fully litigated federal constitutional claims in the state courts in a subsequent federal court action?

The Court below answered in the affirmative.

Statement of the Case

Appellant filed and served the instant complaint (A-7)* upon the appellees in the United States District Court, Eastern District, which apparently seeks redress in the form of reinstatement to his former position with the Nassau County Police Department and for money damages for an alleged violation of his civil rights. Prior to October 22, 1973, the plaintiff was a Sergeant attached to the Nassau County Police Department. On September 13, 1973, he was suspended from his duties as such Police Sergeant by reason of the fact that he was charged with acting in a manner unbecoming an officer which was prejudicial to the good order and efficiency of the Police Department in that, for approximately five years, between October 1968 and September 1973, he did carry on an intimate and illicit relationship with a female other than his wife. In addition, he was further charged with making a false communication to his Superior Officer. He was required by his Superior Officer to submit a written report as prescribed by the Rules and Regulations of the Nassau County Police Department. He stated in said report that he was compelled to write the same against his will with the threat of losing his job and position as a member of the Nassau County Police Department, for which reason he was charged with issuing a false report. The plaintiff took the position that the acts relating to his illicit relationship with a female not his wife, were not committed "while he was actually on duty." He initially refused to give such written report.

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* A— indicates Joint Appendix unless otherwise indicated.

Appellant was thereupon served with charges and specifications, a copy of which is set forth and annexed to the complaint and marked "Exhibit A" (A. 35(a)). He was tried on said charges and specifications at a disciplinary trial between October 2, 1973 and October 5, 1973, pursuant to Section 8-13.0 of the Nassau County Administrative Code, and Section 75 of the Civil Service Law of the State of New York before Deputy Chief Inspector Frank E. Klecak, acting as Trial Commissioner. Deputy Chief Inspector Frank E. Klecak was designated as a Trial Commissioner by Louis J. Frank who was then the Nassau County Police Commissioner. At the conclusion of the disciplinary trial, decision was reserved by the Trial Commissioner. He thereafter, on October 18, 1973, issued his findings of fact and conclusions of law, which he submitted to the Nassau County Police Commissioner, a copy of which is attached to and made part of the motion to dismiss this complaint, FRCP 12(b), (A. 38-51), and is identified as "Exhibit I" (A. 52). Pursuant to the findings of fact and conclusions of law, the appellant was found guilty on both charges and specifications with a recommendation by the Trial Commissioner that the Commissioner of Police impose such disciplinary action as he shall deem fit and proper. The findings of fact and conclusions of law submitted by the Trial Commissioner were approved by the Commissioner of Police, and the disposition of the charges and the determination made by the Commissioner of Police are annexed to and made part of the motion to dismiss the complaint and are identified as Exhibit 2 (A. 53) and Exhibit 3 (A. 54) respectively. On October 22, 1973, appellant was served with a notice in writing by Louis J. Frank, Commissioner of Police, notifying the appellant of his being found guilty on the charges and specifications, and advising him that he was dismissed from his position and that his name be dropped from the rolls of the Nassau

County Police Department as of the 22nd day of October, 1973 (A. 35(b)).

Appellant then commenced a proceeding in the New York State Supreme Court held in and for the County of Nassau pursuant to Article 78 of the New York Civil Practice Law and Rules claiming that his constitutional rights had been violated; that the competent evidence before the Trial Commissioner did not establish his guilt, and further claiming that the dismissal imposed by the Nassau County Police Commissioner was excessive (A. 36). That matter was transferred by a Justice of the Supreme Court of the State of New York, County of Nassau, to the Appellate Division of the Supreme Court, Second Department. On November 15, 1974, the Order of Dismissal was confirmed by the Appellate Division of the Supreme Court, Second Department (46 A.D.2d 848). Appellant then moved for leave to appeal to the Court of Appeals, which motion was denied by the New York State Court of Appeals on February 12, 1975 (36 N.Y.2d 641). On the said 12th day of February, 1975, appellant's appeal was dismissed on constitutional grounds by the New York State Court of Appeals (36 N.Y.2d 713).

Thereafter, appellant petitioned the Supreme Court of the United States of America for a Writ of Certiorari, and his application for such petition was denied by the Supreme Court of the United States of America on November 3, 1975 (46 L.Ed.2d 258). In addition to the foregoing, appellant also moved for reargument before the New York State Court of Appeals, which motion for reargument was denied by the New York State Court of Appeals.

Appellant has attached to his complaint a copy of his petition for a Writ of Certiorari which was submitted to the Supreme Court of the United States of America and

which is identified in said complaint as "Exhibit H" (A. 37(d)). As an aid to the Court, a copy of the brief submitted on behalf of the appellees in opposition to the granting of the petition for Writ of Certiorari is at (A. 54(a)). The statement of facts is more fully set forth in said brief submitted on behalf of appellant to the Supreme Court of the United States of America.

On October 21, 1976, Judge George C. Pratt, U.S.D.J., Eastern District, rendered a memorandum and order (A. 1-5) which granted appellees' motion dismissing the complaint since the complaint fails to state a claim upon which relief can be granted.

On October 29, 1976, the appellant filed a notice of appeal to this Court for review (A. 63).

POINT I

Appellant's fully litigated attack in the State Courts on constitutional grounds preclude him from relitigating the same issues in the Federal Court.

Appellant's original petition for relief pursuant to Article 78 of the NYCPLR (A. 36) and brief (A. 37) in the Appellate Division, Second Department, enunciate the same constitutional claims which he now urges as the basis for the Section 1983 action (A. 2). In all the subsequent appeals in the New York Court of Appeals (A. 37(b)), the Supreme Court of the United States (A. 37(d), A. 54(a)), appellant broached the same constitutional arguments as presently before this Court, all to no avail.

It is equally clear appellant concedes that he certainly did raise issues involving the deprivation of his constitutional rights. Appellant now contends that it is the nature of the action Article 78 proceeding as compared to a

declaratory judgment which makes his present suit viable. Appellees can't agree simply because the controlling factor is not the nature of the action but simply the issues before the various courts.

The issues are the same concerning his constitutional redress and have been decided adversely to him in the state courts as well as the denial of his petition for certiorari in the Supreme Court of the United States.

The Court below properly concluded that in fact appellant herein sought declaratory injunction and monetary relief in the state proceeding (A. 2).

The case of *McCune* v. *Frank*, 521 F.2d 1152 (2d Cir. 1975) clearly demonstrates the applicability of the principle of *res judicata* to a county police department's disciplinary proceeding (P. 1158). Since appellant admits that the factual allegations and constitutional arguments raised in the instant proceeding were raised previously in the state courts, the principles of *res judicata* and full faith and credit which are substantially identical in the instant appeal bar the appellant's action. (Appellant's brief pp. 19, 20), *McCune* v. *Frank*, 521 F.2d 1155 (2d Cir. 1975) page 1155, footnote 8.

The Court below correctly determined that appellant may not use Section 1983 to relitigate constitutional claims which, by his own election, he has already litigated in the state courts. *Thistlewaite* v. *City of N.Y.*, 497 F.2d 339 (2d Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974); *Taylor* v. *N.Y.C.T.A.*, 433 F.2d 665 (2d Cir. 1970); *Hanzimanolis* v. *Codd*, 404 F.Supp. 719 (SDNY 1975), *aff'd no opinion* 538 F.2d 309 (2d Cir. 1976); *Montagna* v. *O'Hagan*, 402 F.Supp. 178 (EDNY 1975).

The law is clear that a Section 1983 appellant is not required to exhaust State remedies, *Monroe* v. *Pape*, 365

U.S. 167 (1961). However, appellant has held nothing in reserve for th instant proceeding because the federal law has played a principal ro'e all along. Simply stated, "the core" of his federal claim in the State petition is precisely the same as the present federal suit. Appellant's two avenues of relief derive from different sources of authority (Federal and State), but involve the same constitutional "core" claims previously litigated in the State courts with the eventual aim of the same result reinstatement. Since the constitutional issues have been raised by appellant in a meaningful manner in the State proceeding, it cannot be relitigated in the Section 1983 action, *Lombard* v. *Board of Education*, 502 F.2d 631, 636, 637 (2d Cir. 1974), *cert.den.*, 420 U.S. 976 (1975), and the complaint was properly dismissed. *Cf. Meyer* v. *Frank, et al.*, No. 76-7172 (2d Cir. 1977).

In *Lombard* v. *Board of Education of the City of New York*, 502 F.2d 631, 637 (CA2 1974), *cert.den.*, 420 U.S. 976 (1975), also a §1983 action, the Second Circuit stated:

> "Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding * * *, the litigant has made his choice and may not have two bites at the cherry. See *Thistlewaite* v. *City of New York*, 497 F2d 339 (2 Cir. 1974).

Additionally, the *Lombard* case cited *supra*, is distinguishable from the case at bar because in *Lombard* the plaintiff had not raised any constitutional issue in the earlier Article 78 proceeding in the state courts, as the appellant has admittedly done in the case at bar.

A constitutional claim, fully litigated without reservation in the state courts, cannot be relitigated in the federal tribunal. Recourse to the Supreme Court is the last resort. (*England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L.Ed. 2d 440, 84 S.Ct. 461 [1964]; *Mead* v. *Frank*, File

No. 73C-1320, E.D.N.Y., *aff'd, no op.*, 506 F.2d 1395 [2d Cir. 1974]).

In *Schmidt* v. *Frank*, 373 F.Supp. 1399 (EDNY 1974), Judge Costantino in dismissing the complaint of the plaintiff, by reason of the fact that the action was commenced in the New York Courts where all the issues raised in the Federal Court were fully considered, and where the New York Court rendered an adverse decision on the merits, held as follows:

> "It is well settled that in cases arising under the United States Constitution state courts enjoy concurrent jurisdiction with federal courts. *Claflin* v. *Houseman*, 93 U.S. 130 (1876). *See also Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 502, 507-08 (1962). Therefore once the matter is conclusively litigated in a state court between the same parties it cannot be relitigated in a federal court. *Johnson* v. *Department of Water and Power*, 450 F.2d 294 (9th Cir. 1971); *Taylor* v. *New York City Transit Authority*, 433 F. 2d 655, 668 (2d Cir. 1970); *Murray* v. *Oswald*, 333 F.Supp. 490 (S.D.N.Y. 1971). *See also Whitner* v. *Davis*, 410 F.2d 24 (9th Cir. 1969). The fact that a party may change the nomenclature of his suit when he comes to a federal court has no import. *Johnson* v. *Department of Water and Power, supra; Howe* v. *Brouse*, 422 F.2d 347 (8th Cir. 1970); *Murray* v. *Oswald*, supra. The plaintiffs are therefore without remedy in this civil action."

The only purpose indicated by the commencement of this action by the appellant against the appellees after all of the issues including the constitutional questions had been fully litigated in the New York State Courts, is an attempt on the part of the appellant to relitigate this matter. Appellant cannot take such action.

In *Rooker* v. *Fidelity Trust Co.*, 68 L.Ed. 362 (1923), it was held that no court other than the Supreme Court of the United States could entertain a proceeding to reverse or modify the judgment of the state court. It was further held in *Rooker* that the jurisdiction basis by the United States District Court is strictly original. Appellant having applied to the Supreme Court of the United States asking it to entertain a proceeding to reverse or modify the judgment of the New York State Courts, which application was denied, has no recourse in this Court and his complaint should be dismissed.

In addition to the appellant being barred from proceeding with his suit herein because of *res judicata*, there is actually no justiciable controversy herein. A similar question was answered in *Lecchi* v. *Cahn*, 493 F.2d 826, 829 (2d Cir., 1974) where the Court held:

> "Aside from the lack of a justiciable controversy, the court below lacked jurisdiction to review the state court's determination of the federal constitutional questions; only the Supreme Court is authorized to review on direct appeal the decisions of state courts. *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970)."

POINT II

Appellant may not maintain this action against the appellees herein.

The appellees, Louis J. Frank and Daniel P. Guido, as former and present Commissioner of the Nassau County Police Department, respectively, are sued solely in their respective representative capacities. There is no allegation in any part of the complaint regarding any act committed

by either of said appellees which spells out any alleged violation of any civil or constitutional right of the appellant. All that he alleges as far as the appellee, Louis J. Frank, as Commissioner of Police, is that said appellee approved the report and recommendation of the Trial Commissioner, and ordered the dismissal of the appellant from the Nassau County Police Department. This act on the part of said Louis J. Frank was an act which he exercised in his discretion and which he had every legal right to do under the circumstances. Except for identifying the appellee, Daniel P. Guido, as the present Commissioner of Police, there is no allegation in the complaint concerning any act or conduct regarding the appellee Guido in connection with the dismissal of the appellant from the Nassau County Police Department on October 22, 1973. Appellant in his complaint is seeking money damages and counsel fees against all of the appellees, including the appellees, Louis J. Frank and Daniel P. Guido, in their respective representative capacities.

Appellant's claim against appellees, Louis J. Frank and Daniel P. Guido, is a claim against them in their respective official capacities. Where one seeks damages against a state, county, city or other municipal official in his official capacity, the suit is in actuality one against the political unit itself since recovery in such an action will be against the public treasury. *Monell* v. *Dept. of Soc. Serv. of City of N.Y.*, 532 F.2d 259, 265 (2d Cir. 1976). Since the political subdivision is not a "person" within the meaning of 42 U.S.C. Section 1983, *Monroe* v. *Pape*, 365 U.S. 167, 187-192, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *U.S. Ex rel. Gittlemacker* v. *Philadelphia*, 413 F.2d 84, 86 (3d Cir. 1969), *cert. den.*, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970), the federal courts would be without

jurisdiction to assess damages under Section 1983 against Louis J. Frank as Police Commissioner and Daniel P. Guido as Police Commissioner in their official capacity, which appellant would seek to have satisfied out of the public treasury.

In *Francis* v. *Davidson*, 340 F.Supp. 351, 370 (U.S. Dist. Ct. Maryland, 1972), *aff'd.* 34 L.Ed.2d 168, 409 U.S. 904 (1972), the Court held as follows:

> "To the extent plaintiffs seek to hold defendants herein liable for damages under section 1983 in their official capacities as officers of the State of Maryland, 'such a suit is in actuality one against the State, even though the State is not named as a defendant.' *Westberry* v. *Fisher, supra,* 309 F.Supp. at 18, and cases cited thereat. See also *O'Neill* v. *Early,* 208 F.2d 286, 289 (4th Cir. 1953).
>
> "Approaching the case as one against the State, all claims herein for damages must fail. In the first place, the State is not a person within the meaning of section 1983. *Monroe* v. *Pape, supra,* 365 U.S. at 187-192, 81 S.Ct. 473, 5 L.Ed.2d 492; *Hewitt* v. *City of Jacksonville,* 188 F.2d 423 (5th Cir.), cert. denied, 342 U.S. 853, 72 S.Ct. 58, 96 L.Ed. 631 (1951); *Westberry* v. *Fisher, supra,* 309 F.Supp. at 18."

In *Poindexter* v. *Woodson*, 357 F.Supp. 443, 459-460, *aff'd* 510 F.2d 464 (10th Cir. 1975), it was determined that there could be no recovery of money damages or of attorney's fees against a State official sued in his official capacity.

It is, therefore, apparent that in addition to there being no federal claim against the appellees, Louis J. Frank and Daniel P. Guido, in their respective representative capacities, the action against the Nassau County Police Department and the County of Nassau should also be dis-

missed. Although the appellant does not designate the Nassau County Police Department as a defendant in this suit, he does in Paragraph "6" of his complaint (A. 9) set forth that the defendant, THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, is an agency of the defendant, the COUNTY OF NASSAU. THE COUNTY OF NASSAU, which is identified in the complaint as THE COUNTY OF NASSAU, NEW YORK, is a municipal corporation.

In City of *Kenosha* v. *Bruno,* 412 U.S. 507, 513 (1973), the Court held:

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, 'Congress did not undertake to bring municipal corporations within the ambit of' §1983, id., at 187, 5 L.Ed. 2d 492, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

The same ruling was made on *Gonzalez* v. *Doe,* 476 F.2d 680 (2d Cir. 1973), where it was held that an action against the City of Hartford could not be prosecuted in an action commenced pursuant to 42 U.S. Code §1983 because the Court, in dismissing the action against the City of Hartford held, at page 681, that the City was not a "person" within the meaning of 42 U.S. Code § 1983 and that, therefore, it may not be sued thereunder.

It is, therefore, apparent that there is nothing to suggest that the generic word "person" in 42 U.S.C. § 1983

was intended to have an application to the Nassau County Police Department or to the County of Nassau. Since there is no cause of action against either the Nassau County Police Department or the County of Nassau for the reasons set forth above, there can be no determination for the purposes of equitable relief for restoration of appellant to his former position with the Nassau County Police Department, nor can he have any claim for damages against the County of Nassau, or the Nassau County Police Department, or against the appellees, Louis J. Frank and Daniel P. Guido, who are being sued herein in their respective representative capacities.

The complaint of the appellant was properly dismissed as against all appellees.

CONCLUSION

The memorandum and order of the court below should be affirmed in all respects.

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Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District of New York

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Affidavit of Service By Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 15th day of February 1977 he served three copies of the attached Brief On Behalf of Appellees on Sutter, Moffatt, Yanelli & Zevin, Attorneys for Plaintiff-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Sutter, Moffatt, Yanelli & Zevin, Esqs.
33 Willis Avenue
Mineola, New York 11501

Louis Mark

Sworn to before me this

15th day of February 1977

Juniter E. VanWagner

QUINTON [illegible] New York
Notary Public [illegible]
No. 24-4657463
Qualified [illegible] County
Commission [illegible] March 30, 1977

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